Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 79-1575

SAMUEL DE MILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Petitioner,

-against-

THE STATE OF NEW YORK, LOUIS LEFKOWITZ, Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York, CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT KOCH'S BRIEF IN OPPOSITION

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Respondent Mayor Edward Koch, on

behalf of the City of New York, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the New York State Appellate Division's opinion in this case. The New York State Court of Appeals had denied petitioner's motion for leave to appeal to that Court.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The petition for certiorari was not filed within the applicable time limitation.

The instant petition is for a writ of certiorari to the New York State Court of Appeals.

A writ of certiorari must be applied for within ninety days after the entry of judgment or decree in the State's highest court. 28 U.S.C. §2101(c). This

Court has uniformly treated such statutory limitation as jurisdictional. Marquette National Bank v. First of Omaha Corp., 439 U.S. 299, 307 n.18 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 512 (1975) (dissenting opinion); Department of Banking v. Pink, 317 U.S. 264, 268 (1942). See also Stern & Gressman, Supreme Court Practice 389 (5th ed. 1978).

Here, the New York State Court of Appeals denied petitioner's motion for leave to appeal and entered judgment on January 8, 1980. (Annexed herein as Exhibit "A".)* The instant petition was docketed on April 8, 1980, which is the ninety-first day after the date of the entry of the Court of Appeals' judgment.

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*See also Petitioner's statement on "Jurisdiction of the Court" and page 5 of the Petition.

Accordingly, the petition must be denied for lack of jurisdiction.

2. Neither the decision below nor the record raises the Question Presented in the petition.

The sole question presented in the petition (p. 2) is whether Section 23.3 of Chapter 201 of the Laws of New York (1978) [N.Y. Unconsol. Laws §5408(3) (McKinney 1979)] is repugnant to the 14th Amendment of the Federal Constitution.

In the proceedings below, although the trial court addressed the Federal equal protection question in its decision, petitioner never properly presented the question in its papers to either the Appellate Division or the Court of Appeals. Except for the mere mention of a violation of the Federal Constitution, most of petitioner's objections have

been raised throughout the proceedings as a matter of State law.

The Appellate Division modified the judgment of the trial court by reversing the trial court's rendering of declaratory relief for respondents and granted respondents' cross-motion to dismiss on the ground that the cause was not ripe under State law. The Court of Appeals denied petitioner's motion for leave to appeal to that Court.

It is well settled that the Supreme Court will not decide federal constitutional issues which were not raised and decided in the state court below. Cardinale v. Louisiana, 394 U.S. 437 (1969). Since the underlying basis of a petition for a writ of certiorari is the contention that the state's highest court has incorrectly adjudged federal rights,

the question for review must necessarily have been properly presented and decided by that court. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); Street v. New York, 394 U.S. 576, 581-582 (1968); Herndon v. Georgia, 295 U.S. 441, 445 (1934).

The mere mention of a federal claim is insufficient. There must be something more than a naked claim that a Federal question exists. New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336 (1902). A question is considered sufficiently presented where "the claim of invalidity and the ground therefore [are] brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done . . ." Street v.

New York, 394 U.S. at 584 quoting New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

As noted above, the Federal question was never properly raised or presented to the State's highest court (in this case, the Appellate Division*), but dismissed on State standing grounds without addressing any Federal questions. It is therefore inappropriate for petitioner now to raise an objection based on the Federal Constitution in this Court. See Puget Sound Power & Light Co. v. County of King, 264 U.S. 22, 25 (1923); American Surety v. Baldwin, 287 U.S. 156 (1932).

As this Court stated in Street v. New York, 394 U.S. 581:

"In order to vindicate

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*See Point 3, infra.

> our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York Courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellants' conviction. If the question was not so presented, then we have no power to consider it. (cites omitted)."

It is submitted that this Court is without jurisdiction to review the question presented by petitioner and thus must dismiss the petition.

3. The judgment below rested on an independent and adequate state ground.

It is settled law that the Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 502 (1976); Jankovich

v. Indiana Toll Road Comm., 379 U.S. 487 (1964); Henry v. Mississippi, 379 U.S. 443 (1964); Cramp v. Board of Public Instruction of Orange Co., 368 U.S. 278 (1961).

As stated by this Court in Zacchini v. Scripps-Howard Broadcasting Co., supra, 433 U.S. at 566:

> "[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945)."

In the instant case, since the New York State Court of Appeals declined to review the judgment of the New York Appellate Division, it is the judgment of this intermediate State court of which

petitioner seeks review by this Court under §1257. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678 n.1 (1968); Michigan - Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954). See also American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 642 n.3 (1976).

The Appellate Division concluded that petitioner's cause of action was premature; that there is presently to genuine dispute under State law. (See Appendix B of Petition.) The judgment was based entirely on state law. The decision does not address any federal questions. Thus, since the judgment below is based on a nonfederal ground and that ground is adequate to support the judgment, this Court is without power to review the judgment of the Appellate Division.

4. Petitioner's argument is without merit.

Assuming arguendo that petitioner has cleared the hurdles presented in the first three points of this brief in opposition, petitioner's application that a writ of certiorari be issued to the Court of Appeals of the State of New York should be denied since his question presents no special and important reasons warranting this Court's review.

The Legislature of the State of New York, by specifically excluding the New York City police employee organizations from the impasse procedures provided by the New York Civil Service Law, §209(4), has determined that petitioner is not a member of the class of other police organizations throughout the State for purposes of this issue. Rather, New York City has, pursuant

to §212 of the Civil Service Law, adopted impasse procedures relevant to its police employee organizations within the Administrative Code of the City, thereby classifying the City police employee organizations with other City employee groups.

The standard added to City labor proceedings by §23 of Chapter 201 of the Laws of 1978 is applicable not only to police impasse proceedings, but also to any other award affecting City employees by an impasse panel, fact-finding or similar-type panel or under or in lieu of determinations made pursuant to Article 8 of the Labor Law of the State.

The classification of petitioner as a New York City labor group rather than as a non-New York City police organization under state law is reasonable. Employees Union v. Helsby, 439 F. Supp. 1272

(S.D.N.Y. 1977).

Therefore, petitioner's allegation of a denial of equal protection under the 14th Amendment of the United States Constitution is without merit, thereby warranting this Court's denial of this petition for the issuance of a writ of certiorari. Hamilton v. Regents of the University of California, 293 U.S. 245, 258 (1934); Parker v. McLain, 237 U.S. 469 (1914); Wabash R.R. Co. v. Flannigan, 192 U.S. 29 (1904).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent Koch

L. KEVIN SHERIDAN,
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APPENDIX A

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of January A. D. 1980

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

No. No. 1216
Samuel DeLilia, President of the Patrolmen's Benevolent Association of the City of New York, et al.,
Appellants,
vs.
The State of New York, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

Joseph W. Bellacosa
Clerk of the Court